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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-516

INLAND OIL & TRANSPORT CO.,
Petitioner,

vs.

UNITED STATES OF AMERICA, UNITED STATES ARMY CORPS OF ENGINEERS, CLIFFORD L. ALEXANDER, Secretary of the United States Army, LEON MCKINNEY, District Engineer, St. Louis District, United States Army Corps of Engineers, JAMES FOGILPHOL, JAMES STEWART and VERNON DREWES,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

Petitioner Inland Oil & Transport Co. (hereafter referred to as Inland) respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on this proceeding on June 29, 1979, and that upon hearing, judgment be reversed.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 600 F.2d 725 (1979) and a copy of the opinion is appended hereto. The opinion of the United

States District Court, Eastern District of Missouri, Eastern Division, is reported at 452 F. Supp. 763 (1978) and a copy of that opinion is appended hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1979. On July 20, 1979 the Court of Appeals entered its order denying Inland's Petition for Rehearing and Rehearing En Banc. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a policy and procedure promulgated by the Respondents herein requiring Inland's river towboats to perform work and assist vessels owned by other companies without reimbursement or identification as a prerequisite for passage through the main lock chamber at Locks and Dam 26 was illegal in violation of the Federal Advisory Committee Act, the Administrative Procedure Act, the National Environmental Protection Act, and the Fifth and Thirteenth Amendments to the Constitution of the United States.

2. Whether Petitioner sustained actual damages as a result of the enforcement of the policy promulgated by Respondents requiring Petitioner's river towboats to perform work in assistance of vessels owned by other companies with reimbursement or indemnification as a prerequisite for passage through the main lock chamber at locks and dam 26.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The provisions involved, cited below, are lengthy and the pertinent text of each is set forth in the Appendix:

1. Fifth Amendment to the United States Constitution;

2. Thirteenth Amendment to the United States Constitution;

3. The Federal Advisory Committee Act, 5 U.S.C. App. 1, et seq.;

4. The Administrative Procedure Act, 5 U.S.C. §551, et seq.;

5. The National Environmental Protection Act, 42 U.S.C. 4321, et seq.;

6. 33 U.S.C. §1; 33 CFR 207.300(d);

7. 33 CFR 209.410(d).

STATEMENT OF CASE

a. **Nature of the Case and Jurisdiction of the District Court.**

Jurisdiction of the District Court was evoked pursuant to the Suits in Admiralty Act, 46 U.S.C. §741; and 28 U.S.C. §1331. Inland filed suit in admiralty seeking:

(1) a declaration that a policy known as the March 16 Policy which is explained below, and which was promulgated and/or enforced by respondents herein was illegal;

(2) Injunctive relief from continued enforcement of the March 16 Policy; and

(3) Monetary compensation for actual damage wrought by enforcement of the March 16 Policy.

Inland's first complaint was filed in the District Court on September 9, 1977 and was twice amended thereafter as the March 16 Policy continued to be enforced against Inland. After extensive discovery, Inland filed its Motion for Summary Judgment on July 21, 1978 and trial commenced on July 31, 1978. Thereupon the Court directed the Defendants to file a Motion for Summary Judgment and on December 13, 1978, entered Judgment for Defendants denying Inland the declaratory, injunctive and monetary relief sought.

b. **The parties**

(1) Petitioner, Inland, is a corporation engaged in the business of transporting petroleum, petroleum by-products, and other cargoes by barge and towboat upon the navigable waters of the United States, including the Mississippi River.

(2) Respondent, United States of America (United States) is a sovereign nation and owns United States Locks & Dam No. 26 on the Upper Mississippi River.

(3) Respondent United States Army Corps of Engineers ("Corps") is an agency of the United States which operates and exercises regulatory control over United States Locks & Dam No. 26.

(4) Respondent Clifford L. Alexander (Alexander) was the Secretary of the Army of the United States and was charged by law with prescribing regulations for the use, administration, and navigation of the navigable waters of the United States.

(5) Respondent Leon McKinney (McKinney) was the District Engineer employed by the Corps and the United States and he exercised overall supervision and control over Locks & Dam 26.

(6) Respondent James Fogilphol (Fogilphol) was an individual employed by the Corps and the United States as Lockmaster of Locks & Dam 26, and he exercised immediate supervision over locking procedures at Locks & Dam 26.

(7) Respondent James Stewart (Stewart), was an individual employed by the Corps in the position of "Shift Chief" at Locks & Dam 26 in charge of locking boats.

(8) Respondent Vernon Drewes (Drewes) was an individual employed by the Corps in the position of "Shift Chief" in the same capacity as Stewart.

c. **Locks and Dam 26:**

Locks and Dam 26 is located at Mile 202.9 on the Upper Mississippi River at Alton, Illinois. In order for vessels to transit the river past Mile 202.9, Locks 26 must be utilized. The facility has two chambers, the main lock, 600′ x 110′ and the small auxiliary lock 360′ x 110′. The main lock chamber is too small to accommodate most tows and they are generally broken up and transit the main chamber in two locking procedures. The small chamber is even less efficient than the large chamber because of its size and requires more locking procedures and therefore more time than the main chamber to accommodate large tows of equivalent size.

d. **The Law Governing Precedence for Passage Through Locks.**

The law governing precedence of vessels for passage through locks is published in 33 C.F.R. 207.300(d) and reproduced in the appendix. Essentially, river tow boats are entitled to transit a lock in the order of their arrival.

e. **The March 16 Policy, Promulgation of the Policy and Effect of Compliance.**

1. The Policy.

The policy complained of and referred to herein as the "*March 16 Policy*" was promulgated and enforced by the United States through the Corps and the other named Respondents with the assistance of a special advisory committee and required Inland's river towboats to do work in the form of pushing barges belonging to others in and around Locks 26 without indemnification or compensation as a prerequisite for timely passage through the Lock. This policy was enunciated by the Corps in a Special Notice to Navigation Interests of 16 March 1977 which incorporated fully the provisions of a memorandum from the Government-Industry River Advisory Committee which was attached to the said notice.

2. Promulgation of the March 16 Policy and the Role of the Government-Industry River Advisory Committee.

The March 16 Policy was promulgated by the United States through the Corps and McKinney by utilization of a committee, the "Government-Industry River Advisory Committee," (sometimes known as: GIRAC) which was not composed wholly of full-time officers or employees of the Federal Government. GIRAC's purpose was to give advice or recommendations to one or more agencies or officers of the Federal Government, including Respondents herein.

The advisory committee:

a) was established and met without publication of notice of same in the Federal Register and without taking steps to insure that all interested persons were notified of such meetings:

b) did not make all documents prepared by or for said committee available for public inspection and copying;

c) met without filing a charter;

d) met without keeping detailed minutes of each meeting.

Furthermore, the March 16 Policy was promulgated following substantial advanced planning by the Corps without first publishing general notice in the Federal Register; without giving interested persons an opportunity to have their opinions heard or to participate in the making of said policy, without affording opportunity to amend the policy, without first preparing an environmental impact statement; and without an analysis and/or study by McKinney of the extent of the environmental consequences and of other alternatives to the proposed action.

3. Effect of Compliance with the March 16 Policy

In order to comply with the requirements of the policy, a river towboat was required to leave its own barges and pull or push another towboat's barges through the locks. However, there

was no provision for the supervision or maintenance of facilities for placement of those barges. Accordingly, the requirement created an extremely hazardous situation with respect to Inland's barges because of the nature, toxicity and volatility of their cargo. The work performed for other towboats required by the policy was to be done without compensation or indemnity.

f. **Inland's Long Standing Corporate Rule With Respect to the Performance of Work for Other Companies**

Inland has a long standing corporate rule that its river towboats do not assist vessels of other companies except in an emergency situation unless Inland is paid and indemnified for its work by the other company. The basis of this rule is to minimize Inland's exposure for pollution of the river and/or explosions. Inland will not relinquish control of its tank barges to others who may not be trained or licensed by the Coast Guard to handle their dangerous cargo, nor will it handle barges of others which may contain cargo that Inland's employees are not trained to handle.

g. **The Incidents Prompting This Lawsuit**

1. The LADY ROSEMARY, August 22, 1977

At approximately 11:26 a.m. on August 22, 1977, the M/V LADY ROSEMARY, a river towboat owned and operated by Inland, commanded by Captain Lynn Bryan Rankin, with loaded tank barges containing approximately three million gallons of jet aviation fuel and gasoline approached Locks 26 from the south proceeding upstream and requested permission to transit Lock 26. Captain Rankin was ordered to tie off the loaded tank barges in his tow and pull barges belonging to other companies out of Lock 26. Furthermore, Donald Schroeder, an employee and agent of the Corps advised Captain Rankin that he would cause the vessel to lose its turn to proceed through

Locks & Dam 26 unless Inland's vessel would agree to aid and assist other vessels through the lock, without compensation and without indemnification for any damages which might result from Inland's furnishing of said services. After protesting the validity of such a prerequisite, Inland refused to agree to furnish such services, whereupon Captain Rankin was ordered by Corps personnel not to approach Locks and Dam 26 until further direction of the Corps.

The refusal to permit the M/V LADY ROSEMARY to approach and transit the lock was pursuant to the March 16 Policy. As a result of this action by the United States through the Corps, Fogilphol and its agents and employees, Inland's vessel was delayed five hours and twenty minutes and Respondents stipulated that Inland was damaged at a rate of $120.00 for each hour of delay. Therefore, Inland suffered actual monetary damage on this occasion of $640.00. The testimony of Captain Rankin was misapprehended by the District Court which failed to find that Inland was damaged. The District Court's finding is discussed below in *"REASON FOR GRANTING WRIT"*.

2. The LADY KIMBERLY Incidents, September 10 and September 28, 1977.

On September 10 and 28, 1977, pursuant to the March 16 Policy, the M/V LADY KIMBERLY and loaded tank barges owned and operated by Inland was denied passage through the main lock chamber at Locks and Dam 26. Although this forced Inland to hire a harbor tugboat and incur expense in transiting the small lock chamber the District Court found Inland suffered no actual damage on these dates. Inland respectfully disagrees.

h. **Termination of the March 16 Policy**

The March 16 Policy was withdrawn pursuant to an Agreed Order entered by the District Court on September 30, 1977. The Agreed Order rendered moot the need for a preliminary injunction at that time, however, the Order did not render moot the remaining issues and provided Inland no relief for the actual damage it had sustained as a result of enforcement of the March 16 Policy.

REASON FOR GRANTING WRIT

The Executive Branch of the United States Must Not Be Permitted to Appropriate Property of Citizens Without Adhering to Fundamental Statutory and Constitutional Law

1. **Introduction.**

Although this case involves a relatively small amount of monetary damage, it is not, fundamentally, a case involving money. It is, rather, a case involving the property rights of Inland as a private corporation which, by analogy, represents all private citizens who own property and are threatened by Federal regulation and confiscation. Inland has pursued this case and brought it to this court because of the significance of the personal private property rights that were cavalierly disregarded and destroyed by the United States and the Corps of Engineers through the named individual Respondents. The issues presented by this Petition are far reaching in consequence because if the Corps of Engineers can confiscate Inland's property by arbitrarily requiring its privately owned river towboats to perform work for other private companies, without compensation or indemnification so too can other government agencies (and agency employees acting under the cloak of official authority) establish arbitrary rules which threaten the very essence of private and personal rights. During oral argument, the Eighth Circuit Court of Appeals evidenced the opinion that the March 16 Policy was clearly illegal. Neither the Court of Appeals nor the District Court reached the merits of the illegality of the procedure by which the March 16 Policy was adopted nor of the substantive illegality of that policy. Both Courts refused to deal with the merits of this case and took refuge from the issues by adopting the opinion that Inland was not really damaged by the March 16 Policy.

The District Court, in the finding sanctioned by the Court of Appeals, was so clearly erroneous in its interpretation of the

evidence concerning Inland's actual damages that its opinion not only so far departs from the usual course of judicial proceedings as to call for the exercise of this Court's power of supervision but, indeed, shocked the conscience of those familiar with the evidence. The facts concerning the first incident occurring on August 22-23, 1977 demonstrates the District Court's departure sanctioned by the Court of Appeals.

2. **The Incident of August 22-23, 1977**

The Respondents stipulated that Inland incurred damage which accrued at the rate of $120.00 per hour when its river towboats were delayed. On August 22, 1977 pursuant to enforcement of the March 16 Policy the M/V LADY ROSEMARY *was not permitted to even approach* the Locks and Dam 26 complex, much less utilize the small auxiliary chamber rather than the main chamber. The uncontroverted affidavit of Captain Lynn Bryan Rankin which was *the only evidence* on this matter is reproduced in full in the Appendix and in relevant portion reads:

> "7. That the lock man I talked to by radio at Locks and Dam 26 told me that if the M/V LADY ROSEMARY would not tie off its tow and assist in pulling the barges belonging to other companies, we would be placed at the bottom of the list of vessels waiting to lock through Locks and Dam 26.
>
> 8. That the lock man I talked to by radio at Locks and Dam 26 refused to give us indemnity in writing and said that they could not and would not be responsible.
>
> 9. That the lock man at Locks and Dam 26 told me that I could not even approach Locks and Dam 26 until he called me on radio channel 14 when he got ready for us to lock through.
>
> 10. That I was not offered the option of even using the auxiliary lock but to the contrary, I had been told that I

could not approach Locks and Dam 26 until I was notified to do so on radio channel 14 as a result of my refusal to tie off my tow and pull the barges of other companies in a non-emergency situation without first receiving indemnity."

In the face of this unrefuted testimony the vessel was directed not to approach the Locks and Dam 26 complex, the District Court illogically and erroneously held that Captain Rankin should have then asked to use the auxiliary chamber of the Locks and Dam 26 complex.

The Court's artificial requirement that the vessel master inquire again, after being denied permission to use the facility and after being told to await further instructions is the crux of judicial activity in this case to date. It is the reason the Courts below have found no actual damage to Inland and, therefore, have not dealt with the illegality of the March 16 Policy.

In fact, as a result of the enforcement of the March 16 Policy on this occasion according to the official records maintained by Respondents, the M/V LADY ROSEMARY and loaded tank barges were delayed five hours and twenty minutes in passing through Locks and Dam 26. Inland thereby suffered damage in the amount of $640.00 according to the stipulated rate of damages which accrued at $120.00 for each hour of delay.

3. **The Illegality of the March 16 Policy.**

The March 16 Policy was developed, promulgated and applied in gross violation of three statutes: the Federal Advisory Committee Act, the Administrative Procedure Act, the National Environmental Protection Act; and was in violation of the Fifth and Thirteenth Amendments to the United States Constitution. The statutory and constitutional violations will be discussed briefly below.

a. **The formation and functioning of the "Government-Industry Advisory Committee" violates the Federal Advisory Committee Act.**

The Federal Advisory Committee Act, 5 USC App. I, Sec. 1, *et seq.* provides, *inter alia*, for broad rights and public access to meetings and records of advisory committees to the Federal Government, *Center for Auto Safety v. Tiemann*, 414 F. Supp. 215 (D.C. 1976).

An advisory committee is defined as "any committee . . . which is established or utilized by one or more agencies, in the interest of obtaining advisory recommendations for . . . one or more agencies or offices of the Federal Government . . ." 5 USC App. I, Sec. 3(2). Even an informal *ad hoc* committee qualifies, *Food Chemical News, Inc. v. Davis*, 378 F. Supp. 1048 (D.C. D.C. 1974).

> "It is understood that the defendant utilized an ad hoc committee of industry representatives in order to obtain advice. Such relationship like that with the consumer group, clearly comes within the terms of Section 3(2) of the Act." (Id. at 1051)

It is undisputed that the Corps utilized the "Government-Industry Advisory Committee" for advice and recommendations in promulgating the March 16 Policy. Indeed, the policy recommended by Government Industry-River Advisory Committee was adopted *in toto* by the Corps and became the policy complained of. Accordingly, the "Government-Industry Advisory Committee" was an advisory committee within the Act.

The utilization of the committee was made without complying with any of the requirements of the Act:

(a) It was established without presidential or statutory authority or without publication in the Federal Register (5 USC App. I, Sec. 9 (a));

(b) An Advisory Committee Charter was not prepared or filed (5 USC App. I, Sec. 9 (c));

(c) It met without publication of notice of its meeting in the Federal Register or without taking steps to insure that all interested persons were notified of such meetings (5 USC App. I, Sec. (10) (a) (12));

(d) It did not make all documents prepared by or for it available for public inspection and copying (5 USC App. I, Sec. 10 (3) (b)); and

(e) Detailed minutes of each meeting were not kept (5 USC App. I, Sec. 10 (3) (c)).

In view of the total disregard of the requirements of the Federal Advisory Committee Act, the promulgation of the March 16 Policy was illegal and therefore void, *Food Chemical News, Inc. v. Davis, supra.*

b. **The Administrative Procedure Act:**

The March 16 Policy was established by written notice and established a new procedure by which personnel at Locks and Dam 26 were to govern the order of passage by vessels through the lock. It placed upon commercial towboats the involuntary requirement that they perform work for other vessels in routine, non-emergency situations without compensation or indemnification in order to be allowed passage through the lock. The March 16 Policy is a "rule" and adoption of the policy is "rule making" within the meaning of the Administrative Procedure Act. 5 USC § 551 *et seq.*

The Act defines a "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the . . . procedure or practice requirements of an agency . . ." (5 USC 551 [4]). The Act defines "rule making"

as ". . . agency process for formulating, amending or repealing a rule. . . ." (5 USC 551 [5]). The Court in *P. B. W. Stock Exchange, Inc. v. Securities and Exchange Commission*, 485 F. 2d 718 (CA 3, 1973), interpreted the statute as follows:

> "Rule-making by an agency characteristically involve(s) the promulgation of concrete proposals, declaring generally applicable policies, but not adjudicating the rights and obligations of the parties before it. Furthermore rules ordinarily look to the future and are applied prospectively only . . ." Id. at 732.

Accordingly, the March 16 Policy constituted rule-making within the meaning of this Act.

The Corps has recognized that regulations governing passage of vessels through locks are rules within the meaning of the Administrative Procedure Act. In this regard, pursuant to authority of 33 USC 1, a rule properly made and published in 33 CFR 207.300(d) provides the order of passage by vessels through United States Locks. The regulation reads as follows:

> "(d) Precedence at locks. (1) The vessel arriving first at a lock shall normally be first to lock through, but precedence shall be given to vessels belonging to the United States. Licensed commercial passenger vessels operating on a published schedule or regularly operating in the 'for hire' trade shall have precedence over cargo tows and like craft. Commercial cargo tows shall have precedence over recreational craft, except as described in paragraph (f) of this section.
>
> (2) Arrival posts or markers may be established ashore above and/or below the locks. Vessels arriving at or opposite such posts or markers will be considered as having arrived at the locks within the meaning of this paragraph. Precedence may be established visually or by radio communication. The lockmaster may prescribe such departure

from the normal order of precedence as in his judgment is warranted to achieve best lock utilization."

Instead of following their own lawfully promulgated regulation, the Corps adopted and enforced the recommendations of the Government Industry River Advisory Committee without adhering to any of the procedural requirements of the Administrative Procedure Act.

The March 16 policy emasculates the lawful rule set forth above, and, in violation of the Administrative Procedure Act, formulates an entirely new rule in requiring a vessel to perform work in order to qualify for passage through the lock.

In passing, it may be noted that 33 CRF 207.300(d) does give the lockmaster limited authority to depart from the normal order of precedence as in his judgment is warranted to achieve best lock utilization. This regulation does not, however, give the lockmaster authority to require a boat to perform work for another. Furthermore, the policy complained of was not one established upon the discretion of the lockmaster but was established by an *ad hoc* advisory committee, was inflexible, and in fact, removed all discretion of the lockmaster. This was recognized by the District Court which described the policy complained of as ". . . defendant's inflexible policy respecting aid and assistance requirements . . ." (462 F.Supp. at 766).

Section 553 requires general notice of a proposed rule be published in the Federal Register. The purpose of this requirement was aptly stated by the Third Circuit as follows:

> "Section 553 was enacted to give the public an opportunity to participate in the rule making process. It also enables the agency promulgating the rules to educate itself before establishing rules and procedures which have a substantial impact on those regulated." *Texaco, Inc. v. Federal Power Commission*, 412 F.2d 740, 744 (CA 3, 1969).

Respondents, having failed to publish general notice of the proposed rule making, violated the provisions of 5 USC 553. Inland was accordingly deprived of an opportunity to participate in, and voice its objections to, the rule making process—the very purpose of the notice requirement. The rule having been illegally promulgated is void. *Saint Francis Memorial Hospital v. Weinberger*, 413 F. Supp. 323 (N.D. Cal. 1976).

c. **The failure of the Corps to prepare an environmental impact statement and the failure of McKinney to assess the impact on the environment is a violation of the National Environmental Protection Act.**

The United States and other Respondents admitted that Inland transports hazardous cargoes. The Eighth Circuit Court of Appeals has held with respect to Inland and its cargoes that:

> "Inland . . . owns and operates barges on the navigable waters of the United States in which barges liquid chemicals are transported in bulk. *Some of those chemicals are highly flammable or explosive and some of them are capable of seriously damaging the marine environment if they are spilled or leak out of the barge in which they are being transported.*" (*Inland Oil & Transport Co. v. Adams*, 575 F.2d 184, 185, 187, CA 8, 1978, emphasis added).

The said policy would require Inland's boats to leave their tows containing these hazardous cargoes, but the Corps made no provisions for the placement or supervision of those barges nor any assessment of the hazards to human and marine environment caused by Inland's loss of control of its barges while it is assisting other vessels. Such a situation could significantly affect the quality of the environment within the meaning of 42 USC 4332. For example, one need not speculate on the

severity of the disaster that would result from the breaking loose of barges containing millions of gallons of gasoline above the dam.

The requirements of the Act regarding "major federal action significantly affecting the quality of the human environment," are to be viewed in the conjunctive rather than the disjunctive, *Minnesota Public Interest Research Group v. Butz*, 498 F. 2d 1314 (CA 8, 1974). Accordingly, any policy which *could* significantly affect the quality of the human environment constitutes a "major federal action" which requires the preparation of an environmental impact statement, *Minnesota Public Interest Research Group v. Butz, supra; Morgan v. United States Postal Service*, 405 F. Supp. 413 (W.D. Mo. 1975). Moreover, the substantial planning of the Corps in developing the said policy, procedure or rule constitutes "major federal action." *Natural Resources Defense Council, Inc. v. Grant*, 314 F. Supp. 356 (E.D. N.C. 1972).

Inasmuch as the results of the policy complained of could significantly affect the quality of the human environment, it was incumbent upon the Corps to prepare an environmental impact statement or at the very least McKinney was required to make an analysis and study of the extent of the environmental consequences and of other alternatives to the proposed action, 42 USC 4332, 33 CFR 209.410 (d) (1) and (2) (ii). That neither an environmental impact statement nor analysis was made constitutes a violation of the law.

d. **The Fifth Amendment to the United States Constitution:**

The March 16 policy as implemented constitutes a taking or deprivation without due process of law in violation of the Fifth Amendment to the Constitution of the United States. In its relevant portion, the Amendment states, "No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall property be taken without just compensation."

The effect of the March 16 policy was to require either: the use of Inland's vessels for the benefit of others without compensation or indemnity from hazards which necessarily increased; or; a delay in lockage and the consequent monetary damage attendant thereto. Both said use and delay constitute a taking of Inland's property.

Refusal to comply with the March 16 policy causes delay which is a taking of property in that it causes Inland to lose $120.00 per each hour of delay as stipulated and agreed by Respondents. It also impairs the business vitality of Inland in that delivery of product pursuant to contract cannot be made in a reliably timely fashion.

Compliance with the March 16 policy would constitute a taking of property by requiring the *use* of Plaintiff's vessels and personnel to perform work for other privately owned towboats in competition with Plaintiff without compensation. Chief Judge Meredith recently addressed this issue in an analogous case: *United States of America and United State Postal Service v. City of St. Louis, et al.*, 452 F. Supp. 1147 (E.D. Mo. 1978). In that case, Judge Meredith found the requirement that letter carriers cross private property to be unconstitutional because it involved the *use* and therefore the *taking* of the owner's property without compensation. This case is directly applicable here. The policy complained of requires the *use* of Plaintiff's river towboats at the direction of the Corps. This is a taking of property with absolutely no provisions for compensation.

The Fifth Amendment expressly requires payment of just compensation if the Government takes or requires the use of private property. The power of McKinney and the Corps as part of the executive branch of the government, to promulgate the said policy *must* be authorized by an Act of Congress or the Constitution, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). There is no such authorization in this

case. Even the President, in the use of his war powers, cannot take over or use private property. *Youngstown Sheet & Tube Co. v. Sawyer, supra.*

Moreover, the taking of Inland's property required by the March 16 Policy subjected Inland to additional risks of liability and damage to its loaded petroleum and chemical tank barges and its river towboats without providing indemnification. In *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799 (1950) this court held the exposure of private property to damage by Government action without compensation constitutes a taking of private property in violation of the Fifth Amendment. Here it is clear that the private property of Inland and others is exposed to damage.

The policy complained of violates procedural due process of law as well. Respondents implemented and enforced the said policy without giving Inland notice and an opportunity to be heard despite the fact that it required the use of Inland's vessels without compensation, exposed it to liability without indemnification, deprived it of its guaranteed free use of the river (dating from the Northwest Ordinance of 1787, 1 Stat. 52, Article IV) and resulted in delays in the delivery of its product which may affect its continued business relationships.

Notice and opportunity to be heard are the barest minimum of procedural due process, *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 305 (1950); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) and *Goldberg v. Kelly*, 397 U.S. 254 (1970).

c. The Thirteenth Amendment to the United States Constitution.

The inflexible requirement that Inland's vessels perform work for others as a prerequisite for full use of the Locks and Dam

26 facility constitutes an involuntary servitude prohibited by the Thirteenth Amendment to the Constitution of the United States.

> "Section 1. Neither slavery nor involuntary servitude, except as punishment for a crime whereof the parties shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this Article by appropriate legislation."

The purpose of the Thirteenth Amendment was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States, *Pollock v. Williams*, 322 U. S. 4 (1944); *Wiedenfeller v. Kidulis*, 380 F. Supp. 445 (E.D. Wis. 1974); *Jobson v. Henne*, 355 F. 2d 129 (CA 2, 1966).

The above-cited cases hold that compulsory labor in ›sed to assist in the defraying of institutional costs without therapeutic value to the laborer is violative of the Thirteenth Amendment.

In this case even if the purpose of requiring involuntary aid and assistance was to expedite movement of traffic at Locks and Dam 26 with the intention of defraying overall industry (institutional) costs the enforced labor is of no value to Inland. In fact, in Inland's case (the transportation of highly flammable products), the requirement has a negative value by increasing the risk of explosions and/or pollution of the Mississippi River and thereby exposing Inland to liability without indemnification. Accordingly, the requirement of performing work for others without compensation and/or indemnification is a violation of the Thirteenth Amendment to the Constitution of the United States.

CONCLUSION

The spectre of the promulgation and enforcement of the March 16 Policy which caused actual damage to Inland raises extremely significant legal issues which should be considered on their merits. Thus far, the merits of these issues have not been reached by the District Court or the Court of Appeals. Therefore, Inland respectfully requests that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

GOLDSTEIN and PRICE

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Petition for Writ of Certiorari was served by regular U.S. mail, postage prepaid, upon the following counsel of record:

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Dated this 26th day of September, 1979.

PAUL R. HALES

APPENDIX

APPENDIX

1. **The District Court Opinion:**

Inland Oil and Transport Co. v. United States, et al.
462 F. Supp. 763 (E.D. Mo., 1978)

MEMORANDUM OPINION

REGAN, District Judge.

Before the Court are cross motions for summary judgment. The case arises out of the implementation of a Special Notice to Navigation Interests issued March 16, 1977 by the St. Louis District of the United States Army Corps of Engineers, an agency of the United States of America. The Special Notice established a locking precedence procedure at Locks and Dam No. 26 operated by and under the control of the Corps, and which is located at Mile 202.9 on the Upper Mississippi River at Alton, Illinois.

The effect of the Special Notice was to require vessels using Locks 26 to be "ready, willing and able" prior to being placed on the waiting list for transit through Locks 26, that is, being ready to lock in the desired configuration and willing to assist (without compensation or indemnity) other vessels at such Locks as a condition of locking through its main locking chamber.[1]

Alleging that on three occasions it sustained damages because its vessels (with cargoes of petroleum and petroleum products) were denied permission to timely proceed through Locks 26 by reason of its refusal as a precondition thereto to agree to furnish aid and assistance to other vessels without

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[1] Locks No. 26 has two lock chambers, a main chamber (600′ × 100″) and an auxiliary chamber (360′ × 110″).

compensation and without indemnification for any damages, plaintiff sought declaratory, injunctive and monetary relief. Joined as defendants are the United States of America, the Army Corps of Engineers, the Secretary of the Army, the District Engineer of the St. Louis District, the Lockmaster and (by amendments) two Shift Chiefs at Locks and Dam No. 26. We are alleged to have jurisdiction under the Suits in Admiralty Act (46 U.S.C. §§ 741-752, the Administrative Procedure Act (5 U.S.C. §§ 706 and 705), and the Constitution and laws of the United States (28 U.S.C. § 1331).

It is plaintiff's position that the mandatory locking procedence procedure set forth in the March 16, 1977 Special Notice is invalid, in that it was developed and promulgated without complying with the Administrative Procedure Act and the Federal Advisory Committee Act. Additional contentions are that the procedure, as applied to plaintiff, is violative of the National Environmental Protection Act and the 13th and 5th Amendments to the Constitution.

By way of background: Because of long-standing traffic congestion problems at Locks 26, the Corps of Engineers contracted with Peat, Marwick, Mitchell & Co. to study alternative methods for increasing the lock's capacity, pending future Congressional authorization for the construction of a replacement facility. Three alternatives were considered in the report which followed, the third of which, the Industry Choice Plan (which included a "self-help" procedure) was determined to yield the greatest incremental benefit/cost ratio.

It is undisputed that an informal, loosely organized "Government-Industry River Advisory Committee," which was composed in part of representatives of the American Waterways Operators (of which plaintiff is a member), recommended that the Corps adopt the Industry Choice Plan. The St. Louis District decided thereafter to utilize the self-help procedure and

issued a Special Notice to that effect dated October 13, 1976. However, it was not until the Special Notice of March 16, 1977 that the District implemented the procedure.

There is a serious question as to whether the "Government-Industry Advisory Committee" comes within the purview of the Federal Advisory Committee Act (5 U.S.C. App. 31 et seq.), and if so, whether the deficiencies of which plaintiff complains suffice to invalidate the March 16, 1977 Special Notice (which as noted infra, has since been rescinded). So, too, it is doubtful whether the speculative possibility of a petroleum spillage serves to make the lockage precedence plan a major federal action which has a significant effect on the quality of the human environment and thus subject to the requirements of the Environmental Protection Act.

It is also not clear whether the Special Notice was a rule within the purview of the Administrative Procedure Act. The Secretary of the Army had theretofore promulgated regulations which are applicable to Locks and Dam No. 26 and in particular to the authority of the lockmaster. In 38 CFR 207.300 subsection (a) the lockmaster is authorized to depart from the regulations "as he deems necessary" in the event of any emergency. And in subsection (d) which sets forth the "normal" order of precedence at locks generally, the regulation expressly states that "the lockmaster may prescribe such departure from the normal order of precedence as in his judgment is warranted to achieve best lock utilization."

It is obvious that in the judgment of the St. Louis District, the situation at Locks 26 was such as to mandate some departure from the normal order of precedence in order "to achieve best lock utilization." Neither plaintiff nor any one else was compelled to make its services available for and to other vessels. However, in the interest of best lock utilization, the availability of such aid and assist services on a voluntary basis, was deemed necessary by the District.

We deem it unnecessary to definitively rule plaintiff's contentions, and in particular, to determine whether under the facts, it is entitled to declaratory and injunctive relief. Less than three weeks after this suit was filed, the requirements of the Special Notice of March 16, 1977, that vessels be willing to render aid and assistance to other vessels without compensation and indemnity as a condition of locking in normal sequence through the main channel of Locks 26, was rescinded, and the "normal" order of precedence through the main channel of Locks 26 was reinstated. In our judgment, that issue is moot or at least not presently for decision.

We recognize, of course, that the power of a court to grant injunctive relief survives discontinuance of the allegedly illegal conduct. See *U. S. v. W. T. Grant Co.*, 1953, 345 U.S. 629, 633, 73 S.Ct. 894, 898, 97 L.Ed. 1303. However, as that Court stated, an injunction is appropriate only if "there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive:" or, as stated in *Chacon v. Granata*, 5 Cir. 1975, 515 F.2d 922, 925, the anticipated injury must be "imminent and irreparable." No such situation is here present. In addition to the absence of any suggestion or indication that the self-help policy might again be promulgated in some fashion, we have no doubt that if consideration is again given by the Corps to doing so, the officials would first give adequate consideration to the applicability vel non of the APA, the FACA and the EPA as well as to the other contentions of plaintiff.

This leaves only the issue of plaintiff's alleged damages. Plaintiff claims it sustained damages on three occasions (August 22, 1977, September 10, 1977 and September 28, 1977)[1]

[1] Inasmuch as the mandatory self-help policy applicable to the main chamber of Locks 26 had been in effect since March 16, 1977, it would appear that plaintiff had, subsequent to March 16 and prior to August 22, 1977, either conformed to that policy as to the main chamber or had utilized the auxiliary chamber without incident in either case.

by reason of delays and costs incident to its refusal to agree to provide aid and assistance to other vessels. We first consider the September 10 and 28 damage claims, both of which involve the M/V Lady Kimberly. In each of these instances, the vessel locked through the auxiliary chamber.

As to September 10, 1977, the records show that the Lady Kimberly *completed* passage one minute before the earliest time it could have *commenced* passage through the main lock. Clearly, there was no delay. Plaintiff contends, however, that it was necessary for it to hire a tugboat at a cost of $260 to pass through the auxiliary lock. Even if it be assumed that similar tug expense would not have been incurred for lockage through the main chambers,[2] it is at once apparent that the tug expense was approximately equal to the saving of $120 per hour cost of running the vessel had the main chamber been used.

With respect to September 28, 1977, plaintiff's damage claim is again based on the tugboat expense ($227.50) it incurred in passing through the auxiliary chamber, in addition to an alleged one-half hour delay. The evidence relied on as "proof" of the alleged delay is the fact that although it commenced passage through the auxiliary chamber about a half hour before it could have proceeded through the main chamber, plaintiff's vessel did not complete its passage through the auxiliary chamber until two and a half hours after such passage was commenced, as compared to the time of one and a half hours required for each of two other vessels to pass through the main chamber. We believe that because of numerous variables, this "evidence" is too speculative to justify a finding of a half hour delay. In addition, it is evident from the lockage reports that if the Lady Kimberly had asked to be placed on

[2] The very purpose of the self-help plan, in part at least, was to utilize the services of the other vessels and thus avoid the use of tugboats in many situations.

the list for the auxiliary chamber when it arrived at Locks 26 or even when it was refused a position on the list for the main lock, it would have completed its passage with no delay whatever. And in light of the fact that plaintiff was fully aware of defendant's inflexible policy respecting aid and assist requirements, there was no reason for the vessel to wait from 4:49 to 7:13 to request the use of the auxiliary lock. The records show that until the M/V Tekula arrived at 5:45, almost an hour after the arrival of plaintiff's vessel, the auxiliary lock was available for its use. And even after the Lady Kimberly was expressly refused access to the main chamber at 5:55, its passage through the auxiliary chamber could have been commenced at 7:01 a. m., the time M/V Chas. Sanders, Sr. started lockage after arriving at 6:38 a. m.

As for the tugboat expense, the mere fact it was incurred would be relevant only if assistance would not have been required had the main chamber been available. Plaintiff has made no such showing. The lockage reports for the main chamber show not only that many tows required vessel assistance, but that plaintiff's own vessel, the M/V Lady Rosemary, itself utilized such assistance on the morning of August 23, 1977, in her passage through the main chamber.

The major item of damages claimed ($640) pertains to alleged delay in permitting plaintiff's M/V Lady Rosemary to transit the main channel on August 22, 1977. Plaintiff contends that the vessel with her tow was delayed five hours and twenty minutes.[3] On the other hand, it is defendant's position that had the auxiliary chamber been availed of, the Lady Rosemary would not have been delayed at all. To meet this issue, plaintiff has submitted the affidavit of Lynn Bryan Rankin, the master of the vessel on the voyage in question, the purpose of which was to negative defendant's contention that

[3] It was this action which precipitated the lawsuit.

the auxiliary lock could have been used, in which event there would have been no delay.

Of imporance is the fact that Rankin did not ask to use the auxiliary chamber. And since the policy of aid and assist applied only to the main chamber and a refusal to agree to a willingness to furnish such aid, if requested, resulted only in the loss of the vessel's position in respect to the main lock, we have no doubt that both Rankin and the lockman were referring only to the main chamber in their radio conversation. Obviously, the lockman neither intended to nor had authority to deny access to the auxiliary chamber. At worst, since neither Rankin nor the lockman mentioned the auxiliary chamber, it would appear that Rankin either misunderstood or misinterpreted what the lockman said. Defendant may not be penalized because Rankin did not ask the simple question as to whether the use of the auxiliary chamber was also being denied him.

There being no substantial evidence to support plaintiff's damage claims, it follows from the foregoing that plaintiff's motion for summary should be and it is hereby denied and that defendants' motion for summary judgment should be and it is hereby sustained.

2. **The Court of Appeals Opinion.**

Inland Oil and Transport Co. v. United States et al., 600 F. 2d 725 (8th Cir., 1979).

PER CURIAM.

Plaintiff Inland Oil and Transport Co. (Inland) brought this action against the United States, the Army Corps of Engineers, and a number of individual defendants in the district court[1] to enjoin the continued enforcement of a Special Notice to Navigation Interests issued by the St. Louis District of the Army Corps of Engineers on March 16, 1977. Inland also asked the district court to declare the procedures established by the Special Notice to be illegal and to award Inland actual and punitive damages.

The effect of the Special Notice was to establish a locking precedence procedure for towboats and barges using the main locking chamber of Locks and Dam No. 26 on the Mississippi River near Alton, Illinois. In order to keep its place on the waiting list for transit through the main chamber, a tugboat had to be willing to assist other vessels using the locks. This assistance was required to be furnished without compensation or indemnification for loss and a boat which failed to follow this procedure lost its place in line. A smaller, auxiliary chamber was not subject to this locking precedence procedure.

Inland, which is in the business of transporting petroleum and petroleum by-products on the Mississippi River by means of barges, refused to allow its towboats to render assistance as required by the procedure. As a result it alleged that its boats suffered delays and incurred other additional expenses in using the locks on three occasions. The district court considered the case on cross motions for summary judgment and held that the

[1] The Honorable John K. Regan, United States Senior District Judge for the Eastern District of Missouri.

discontinuance of the procedure had eliminated the necessity for injunctive and declaratory relief. It also found that Inland had not sustained any damages and granted summary judgment in favor of the defendants.[2] We affirm.

Inland argues that the district court erred in holding that its claims for injunctive and declaratory relief were rendered moot by the discontinuance of the procedure. Although the district court did raise the possibility that Inland's claims were moot, it is clear from the unpublished memorandum opinion and the authorities cited therein that the district court considered these claims on their merits and declined to order such relief. *Inland Oil & Transport Co. v. United States*, 462 F.Supp. 763 at 765 (E.D.Mo.1978).

Although the district court arguably had the power to grant the relief sought, it does not follow that it was required to do so.

> [T]he moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it.

United States v. W. T. Grant Co., 345 U.S. 629, 633, 73 S. Ct. 894, 97 L.Ed. 1303 (1953). *See also Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). In this case the district court found that the Special Notice had been rescinded and the locking precedence proce-

[2] We note that this case was presented to the district court on cross motions for summary judgment on the basis of a well developed record including affidavits and other documentary evidence. Inland does not contend on appeal that the case is not ripe for summary judgment or that it would submit additional evidence if the cause were tried. Nor does Inland ask this court to remand the case for trial.

dure discontinued in 1977 and that there was no indication that the practice might be reinstituted. We also note that this procedure, which was established to facilitate the movement of river traffic through the locks, was in force for only seven months during 1977. In these circumstances, we cannot say that the district court abused its discretion in refusing to grant the declaratory and injunctive relief sought by Inland.

Inland also challenges the district court's finding that it sustained no actual damage on the three occasions when Inland alleges that its vessels were delayed in transiting the locks. We recognize at the outset that summary judgment is an extreme remedy which may not be granted unless the movant has established his right to the judgment beyond controversy and that summary judgment is not appropriate where material facts remain in dispute. Moreover, in ruling on a motion for summary judgment, the district court must view the facts in the light most favorable to the party opposing the motion and give that party the benefit of all reasonable inferences to be drawn from the evidence. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 153-59, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Robert Johnson Grain Co. v. Chemical Interchange Co.*, 541 F.2d 207, 209-10 (8th Cir. 1976); *Giordano v. Lee*, 434 F.2d 1227, 1230-31 (8th Cir. 1970), *cert. denied*, 403 U.S. 931, 91 S.Ct. 2250, 29 L.Ed.2d 709 (1971). Nevertheless, summary judgment is an important method of promoting judicial economy by preventing the trial of cases in which no genuine issue of fact remains. Therefore, a party opposing a motion for summary judgment may not rest upon his pleadings but must set forth specific facts showing a genuine issue for trial. *Anderson v. Viking Pump Div. Houdaille Indus., Inc.*, 545 F.2d 1127, 1129 (8th Cir. 1976); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125, 93 S.Ct. 939, 35 L.Ed.2d 257 (1973).

Bearing these principles in mind, we have examined each alleged incident of delay and conclude that the district court

did not err in finding that no genuine issue of fact remained and that Inland failed to set out facts to substantiate its claims for damages.

Affirmed.

3. **Affidavit of Capt. Lynn Bryan Rankin.**

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Inland Oil & Transport Co., Plaintiff.	
v.	Cause No. 77-0969 A (B)
United States of America, et al., Defendants.	

AFFIDAVIT

Comes now Lynn Bryan Rankin and having first been duly sworn on his oath states:

1. That he holds a U. S. Coast Guard Mate's and First Class Pilot's License for all tons, motor and steam vessels, on the Ohio and Mississippi Rivers and a U. S. Coast Guard Operator's License for uninspected vessels on Inland Waters and Western Rivers.

2. That on August 22, 1977 he was in the employ of Inland Oil and Transport Co. as a trip master and in command of the M/V LADY ROSEMARY and as such was responsible for the safety of the crewmembers, vessel and cargo.

3. That on August 22, 1977 the M/V LADY ROSEMARY with six loaded barges of gasoline in tow, to wit: the IOT-303, 139, 104, 308, 353 and 307 approached Locks and Dam 26 proceeding northbound on the Upper Mississippi River and requested permission to lock through at approximately 11:30 a.m.

4. That the lockman at Locks and Dam 26 requested by radio that I tie-off the six loaded gasoline barges in my tow and operate the M/V LADY ROSEMARY to pull barges belonging to companies other than Inland Oil & Transport out of Locks and Dam 26.

5. That after checking with the Port Captain of Inland Oil & Transport Co., Robert McEwing, I informed the aforesaid lockman that the M/V ROSEMARY would not assist in pulling barges belonging to other companies in a non-emergency situation unless we received indemnity in writing to protect us.

6. That in my opinion and based upon my training, knowledge and experience I believe it would have been extremely hazardous to tie-off my six loaded gasoline barges because a breakaway of those barges or an accident might cause a catastrophic explosion or at least a spillage of highly toxic chemicals.

7. That the lockman I talked to by radio at Locks and Dam 26 told me that if the M/V LADY ROSEMARY would not tie-off its own tow and assist in pulling the barges belonging to other companies, we would be placed at the bottom of the list of vessels waiting to lock through Locks and Dam 26.

8. That the lockman I talked to by radio at Locks and Dam 26 refused to give us indemnity in writing and said they could not and would not be responsible.

9. That the lockman at Locks and Dam 26 told me that I could not even approach Locks and Dam 26 until he called me on Radio Channel 14 when he got ready for us to lock through.

10. That I was not offered the option of even using the auxiliary lock but to the contrary, I had been told that I could not approach Locks and Dam 26 until I was notified to do so on Radio Channel 14 as a result of my refusal to tie-off my tow and pull the barges of other companies in a non-emergency situation without first receiving indemnity.

/s/ LYNN BRYAN RANKIN

State of Missouri }
City of St. Louis } ss.

Subscribed and sworn to before me this 31st day of July, 1978.

(Illegible)
Notary Public

My Commission expires: 8/14/78

4. **Federal Advisory Committee Act 5 App. I Sec 1** *et seq.* § 3 **Definitions.**

For the purpose of this Act—

(1) The term "Director" means the Director of the Office of Management and Budget.

(2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies of officers of the Federal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.

(3) The term "agency" has the same meaning as in section 551 (1) of Title 5.

(4) The term "Presidential advisory committee" means an advisory committee which advises the President.

§ 9. **Establishment and purpose of advisory committees; publication in Federal Register; charter: filing, contents, copy**

(a) No advisory committee shall be established unless such establishment is—

(1) specifically authorized by statute or by the President; or

(2) determined as a matter of formal record, by the head of the agency involved after consultation with the Director, with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

(b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.

(c) No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the

Director, in the case of Presidential advisory committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:

(A) the committee's official designation;

(B) the committee's objectives and the scope of its activity;

(C) the period of time necessary for the committee to carry out its purposes;

(D) the agency or official to whom the committee reports;

(E) the agency responsible for providing the necessary support for the committee;

(F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;

(G) the estimated annual operating costs in dollars and man-years for such committee;

(H) the estimated number and frequency of committee meetings;

(I) the committee's termination date, if less than two years from the date of the committee's establishment; and

(J) the date the charter is filed.

A copy of any such charter shall also be furnished to the Library of Congress.

§ 10. Advisory committee procedures; meetings; notice, publication in Federal Register; regulations; minutes; certification; annual report; Federal officer or employee, attendance

(a) (1) Each advisory committee meeting shall be open to the public.

(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Director shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Director may prescribe.

(b) Subject to section 552 of Title 5, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

(d) Subsections (a) (1) and (a) (3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory

committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of Title 5. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of Title 5.

(e) There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

(f) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee.

§ 12. Fiscal and administrative provisions; recordkeeping; audit; agency support services

(a) Each agency shall keep records as will fully disclose the disposition of any funds which may be at the disposal of its advisory committees and the nature and extent of their activities. The General Services Administration, or such other agency as the President may designate, shall maintain financial records with respect to Presidential advisory committees. The Comptroller General of the United States, or any of his authorized representatives, shall have access, for the purpose of audit and examination, to any such records.

(b) Each agency shall be responsible for providing support services for each advisory committee established by or reporting

to it unless the establishing authority provides otherwise. Where any such advisory committee reports to more than one agency, only one agency shall be responsible for support services at any one time. In the case of Presidential advisory committees, such services may be provided by the General Services Administration.

§ 13. Responsibilities of Library of Congress; reports and background papers; depository

Subject to section 552 of Title 5, the Director shall provide for the filing with the Library of Congress of at least eight copies of each report made by every advisory committee and, where appropriate, background papers prepared by consultants. The Librarian of Congress shall establish a depository for such reports and papers where they shall be available to public inspection and use.

5. Administrative Procedure Act
5 USC § 551 et seq.

§ 551. Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published

in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) (A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated,

or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who

was primarily responsible for the withholding. The Commision, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

> (i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and
>
> (ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause

(ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having established subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) Related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F)

endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or about March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this subsection; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E),(F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States, or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

6. **National Environmental Protection Act 42 USC § 4332**

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectively, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

7. **33 CFR 207.300(d).**

"(d) Precedence at locks. (1) The vessel arriving first at a lock shall normally be first to lock through, but precedence shall be given to vessels belonging to the United States. Licensed commercial passenger vessels operating on a published schedule or regularly operating in the 'for hire' trade shall have precedence over cargo tows and like craft. Commercial cargo tows shall have precedence over recreational craft, except as described in paragraph (f) of this section.

(2) Arrival posts or markers may be established ashore above and/or below the locks. Vessels arriving at or opposite such posts or markers will be considered as having arrived at the locks within the meaning of this paragraph. Precedence may be established visually or by radio communication. The lockmaster may prescribe such departure from the normal order of precedence as in his judgment is warranted to achieve best lock utilization."

8. **33 CFR 209.410(d)**

(d) *Policy*—(1) *General.* From the initiation of pre-authorization planning through post-authorization planning and design, construction, and operation and management, all Corps of Engineers actions will be evaluated in terms of their impact on the environment within this overall policy. NEPA mandates a view of traditional policies and missions in light of NEPA's national environmental policy which requires all Federal argencies and officials to use all practicable means and measures to enhance, preserve and protect the quality of the environment to the fullest extent possible.

(i) Early and continuing coordination will be undertaken so as to develop a full interchange of views between the Corps

of Engineers officials and appropriate local, State, and Federal agencies and the interested public. These Federal and Federal-State agencies and their relevant areas of expertise include those identified in Appendix II of CEQ's guidelines (38 FR 20557).

(ii) The District Engineer will develop, analyze, study and utilize or adopt all practicable means and measures, including the "no-action" alternative and other alternatives to the proposed action, which will enhance, protect and preserve the quality of the environment, restoring environmental quality previously lost, minimizing and mitigating unavoidable adverse effects; and analyze and study the environment together with engineering, economic, social and other considerations to insure balanced decision making in the total public interest.

(iii) During Corps of Engineers project planning and the related decision making process, a systematic and interdisciplinary approach will be utilized to insure proper weighing and balancing of environmental effects together with the engineering, economic, and social and other considerations affecting the total public interest. Sections 102(2) (A) and (B) of NEPA and section 122, 1970 R&HA.

(2) *Preparation of the environmental statements.* (i) Environmental statements are required by section 102(2) (C) of NEPA. They will constitute an integral part of the interdisciplinary plan formulation process and will serve as a summation and evaluation of the effects, both beneficial and adverse, that each alternative action would have on the environment and as an explanation and objective evaluation of the finally recommended plan.

(ii) Should the District Engineer determine in assessing the impact of a minor action that an environmental statement is not required, the determination to that effect will be placed in the project file. This determination shall be made available to the public upon request and shall include a statement of the facts and the signer's basis and reasons for his decision. It will

be signed by the District Engineer or higher commander and brought to the attention of the public by publication in the 3-year schedule (paragraph (f) of this section). Where more timely notification is essential, public notices may also be used. A minor action is defined as one which, following the completion of an environmental assessment, is determined not to have a significant impact on the quality of the human environment. If the District or Division Engineer is in doubt as to whether or not a statement should be prepared, further guidance must be requested in accordance with paragraph (d)(4) of this section. These determinations are reversible should controversy or other later events require an environmental statement to be written.

(iii) Prior to forwarding, environmental statements will be carefully reviewed by District and Division Engineers to insure that the statement fully complies with the requirements of this regulation and the references cited herein.

(3) *Systematic Review.* NEPA requires an environmental statement in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. To support the spirit of NEPA fully, a systematic review of all Corps of Engineers actions will be conducted and environmental statement prepared in accordance with paragraph (d)(2) of this section.

(4) *Further Policy Guidance.* If after taking all measures within his authority, the District or Division Engineer need further assistance in satisfying the requirements of paragraph (d) (2) of this section, he will report the matter to HQDA (DAEN-CWZ-P) WASH DC 20314, and request the necessary authority or guidance.

9. **Fifth Amendment of the United States Constitution.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (emphasis supplied)

10. **Thirteenth Amendment of the United States Constitution.**

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Supreme Court, U. S.
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No. 79-516

In the Supreme Court of the United States

OCTOBER TERM, 1979

INLAND OIL & TRANSPORT CO., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-8 to A-11) is reported at 600 F.2d 725. The opinion of the district court (Pet. App. A-1 to A-7) is reported at 462 F. Supp. 763.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979. A petition for rehearing was denied on July 20, 1979. The petition for a writ of certiorari was filed on September 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying injunctive and declaratory relief against a governmental practice that is no longer in effect.

2. Whether the district court correctly determined that petitioner suffered no damages as a result of delay in the passage of its vessels through Locks and Dam No. 26 on the Mississippi River.

STATEMENT

Petitioner brought this action in the United States District Court for the Eastern District of Missouri against the United States, the Army Corps of Engineers, and various federal officials to enjoin the continued enforcement of a Special Notice to Navigation Interests issued on March 16, 1977, by the St. Louis District of the Army Corps of Engineers. Petitioner also sought a declaration that the procedures established by the Special Notice were illegal, as well as an award of actual and punitive damages (Pet. App. A-8).

The Special Notice established a locking precedence procedure at the main chamber of Locks and Dam No. 26, which is operated by the Corps of Engineers on the Upper Mississippi River at Alton, Illinois (Pet. App. A-1). The effect of the Special Notice was to establish a priority for tugboats and barges. In order to keep its place on the waiting list for transit through the main chamber, a tugboat had to be willing to assist other vessels using the locks. This assistance was required to be furnished without compensation or indemnification for possible damages. Boats that failed to follow this procedure lost their place in line.[1]

The Special Notice was adopted pursuant to 33 C.F.R. 207.300(d)(2), which provides that the "lockmaster may

[1]Locks and Dam No. 26 have both a main and an auxiliary chamber. The auxiliary chamber was not subject to the challenged precedence requirement (Pet. App. A-8).

prescribe such departure from the normal order of precedence as in his judgment is warranted to achieve best lock utilization" (Pet. App. A-3).[2] Seven months after its adoption, the requirement of the Special Notice dealing with aid and assistance to other vessels was rescinded, and the previously applicable rules of precedence were reinstated (*id.* at A-4).

During the period when the Special Notice was in effect, petitioner refused to allow its tugboats to render assistance as required by the Special Notice. As a result, it claimed that it suffered delays in using the locks on three occasions. Total actual damages of $640 were alleged (Pet. App. A-4 to A-7).

The district court denied petitioner's claim for injunctive and declaratory relief because the Special Notice had been rescinded and the challenged rules of precedence discontinued. The district court found that there was no " 'cognizable danger of recurrent violation' " and no danger of imminent or irreparable injury warranting equitable relief (Pet. App. A-4). The district court also found that petitioner had suffered no actual damage as a result of any delay and denied monetary relief (*id.* at A-5 to A-7). The court of appeals affirmed (*id.* at A-10 to A-11).

ARGUMENT

The court of appeals correctly rejected petitioner's contentions, and further review by this Court is unwarranted.

[2]Because of recurring traffic congestion problems at Locks and Dam No. 26, the Corps of Engineers contracted with Peat, Marwick, Mitchell & Co. to study alternative methods for increasing the locks' capacity, pending congressional authorization for the funding of a replacement facility. The precedence procedure was one of the suggested solutions (Pet. App. A-2 to A-3).

The challenged precedence procedures adopted by the Army Corps of Engineers applied only to one chamber of the locks in question and have now been rescinded. As the lower courts found, there is no indication that the challenged procedures will be reinstated. In these circumstances, the district court did not abuse its discretion in denying injunctive and declaratory relief. See *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953); see also *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148 (1967).

For the reasons stated by the district court (Pet. App. A-4 to A-7), petitioner's claim for $640 in damages based on alleged delays in the passage of its vessels was without evidentiary support. And as the court of appeals noted (*id.* at A-9 n.2):

> [Petitioner] does not contend on appeal that the case is not ripe for summary judgment or that it would submit additional evidence if the cause were tried. Nor does [petitioner] ask this court to remand the case for trial.

In short, petitioner asks this Court to grant certiorari to review evidence relating to its damage claim and draw inferences of fact different from those of both courts below. That is a task this Court repeatedly has declined to undertake. See, *e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *Boehmer* v. *Pennsylvania R.R.*, 252 U.S. 496, 498 (1920); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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